UNITED STATES OF AMERICA	)	
	)	**Prosecution Response**
v.	)	
	)	**to Defense Motion to Compel**
Manning, Bradley E.	)	**Identification of Brady Materials**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**24 May 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The prosecution requests that the Court deny the Defense Motion to Compel Identification of Brady Materials (Defense Motion) because the rules of discovery do not support the defense's request for the prosecution to separate or identify material under *Brady v. Maryland*, 373 U.S. 83 (1963) or Rule for Courts-Martial (RCM) 701(a)(6).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. *See* Manual for Courts-Martial, United States, R.C.M. 905(c) (2008).

FACTS

1. The United States stipulates to those facts cited in Defense Motion ¶ 3.

2. The accused recently relieved two attorneys and removed them from the defense team. *See* 24 Apr. 2012 Article 39a hearing.

3. There are three safes available to the defense. A safe assigned to the Trial Defense Service (TDS) Office on Ft. Myer in Building 229, Joint Base Myer-Henderson Hall, VA, has been available since 12 Oct. 2010. A safe assigned to the TDS Office on Ft. Leavenworth in Building 244, Ft. Leavenworth, KS, has been available since 22 June 2011. A safe assigned to the TDS Office on Ft. George G. Meade has been available since 10 Aug. 2011. *See* Appellate Exhibit V, Enclosure 7.

4. The Unites States established a remote office in a government facility, including a printer, at the Naval War College for Mr. Coombs to enable him to review classified information. *See* Enclosure 2.

WITNESSES/EVIDENCE

The United States does not request any witnesses be produced for this response. The United States respectfully requests that the Court consider Appellate Exhibit V, Prosecution Motion for Protective Order, 21 Feb. 2012, and its enclosures. The United States also requests the Court consider the enclosures listed at the bottom of this motion.

LEGAL AUTHORITY AND ARGUMENT

The Court should not Order the United States to separate and identify specific *Brady* material because the United States is not obligated to prepare the defense's case. The United States has not operated in bad faith and has worked to provide *Brady* materials as soon as practicable pursuant to RCM 701(a)(6).

I. THE UNITED STATES IS NOT REQUIRED TO SEPARATE *BRADY* MATERIAL

RCM 701(a)(6) requires a trial counsel, "as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) [n]egate the guilt of the accused of an offense charged; (B) [r]educe the degree of guilt of the accused of an offense charged; or (C) [r]educe the punishment." RCM 701(a)(6) is the military's *Brady* rule. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). As a general rule, the United States is under no duty to direct an accused to *Brady* material within a larger mass of disclosed evidence. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) *vacated in part on other grounds*, 130 U.S. 2896 (2010) (citing *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997); *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997)); *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010) (citing *Skilling*, 554 F.3d at 576). Additionally, the Seventh Circuit upheld the proposition that the United States is under no duty to direct the defense to exculpatory evidence within a large mass of undisclosed evidence. *See United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) (quoting *Skilling*, 554 F.3d at 576). The Eleventh Circuit has also rejected the claim that the United States must identify specific *Brady* material amidst voluminous material because the defense could request a continuance or advise the United States of a defense theory to help the United States provide relevant discovery materials. *See United States v. Jordan*, 316 F.3d 1215, 1253-54 (11th Cir. 2003). Accordingly, the United States does not violate its *Brady* obligations by providing large quantities of discovery. *Warshak*, 631 F.3d at 274.

Brady "does not place any burden upon the Government to conduct a defendant's investigation." *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990). When evidence is equally available to the defense and prosecution, the accused must investigate and bears responsibility for failing to conduct the investigation diligently. *See Kutzner v. Cockrell*,303 F.3d 333, 336 (5th Cir. 2002). "If the rule were otherwise, it would place '[the United States] in the untenable position of having to prepare both sides of the case at once.'" *United States v. Rubin/Chambers, Dunhill Insurance Services*, 825 F. Supp.2d 451, 454 (S.D.N.Y. 2001) (quoting *United States v. Ohle*, 2011 WL 651849 at *4 (S.D.N.Y. 7 Feb. 2011)). Finally, "*Brady* does not mean that the government must take the evidence it has already disclosed to [the

defense], sift through this evidence, and organize it for [the defense's] convenience." *United States v. Dunning*, 2009 WL 3815739 at *1 (D. Ariz. 12 Nov. 2009).

The United States may satisfy its *Brady* obligations through disclosures of exculpatory or impeachment material within large productions of documents or files. *See Warshak*, 631 F.3d at 297 (describing as "empty" the argument that the government failed to fulfill its *Brady* obligations by handing over millions of pages of evidence to defense to find exculpatory information); *cf. Strickler v. Greene*, 527 U.S. 263, 283 n. 23 (1999) (noting that an open file policy may increase the efficiency and fairness of the criminal process). Simply advising the defense of the availability of 10,000 pages of documents satisfies *Brady*. *See United States v. Serfling*, 504 F.3d 672, 678 (determining that notifying the defendant of the existence of documents and making them available for inspection is not a suppression for *Brady* purposes where defendant chose not to inspect them).[1] The United States has endeavored to disclose all evidence and information contained within the prosecution's files and those files which the prosecution must search, including *Brady* material, as soon as it has been able given the need for classification reviews and approvals. Additionally, the United States has disclosed more broadly than *Brady* requires. *Brady* materials have been and will continue to be provided to the defense, which exceeds disclosing the mere existence of the materials or making them available for disclosure; the provision of materials satisfies the United States' obligations under *Brady*.

The defense contends that the Court should prevent the United States from burying the defense in voluminous discovery. In response, the United States provides *Brady* material as soon as practicable. The United States turns over information after receiving the requisite approvals for unclassified and classified materials. Although the defense claims that nearly 7,000 pages are at issue[2], the defense neglects the fact that many of these pages contain redactions, are blank, or little information; therefore, inspecting the pages to examine the information is easier than sifting through millions of pages to find certain material. Moreover, the page count presented by the defense represents a fraction of the page counts discussed in cases the defense cites. *Compare United States v. Salyer*, 2010 WL 3036444 (E.D. Cal. Aug. 2, 2010) (involving millions of pages); *United States v. Hsia*, (involving 600,000 documents and not pages).

Finally, the United States disputes that it has separated and identified *Brady* material previously or that the United States has a duty to do so. Instead, the United States has provided *Brady* materials to the defense in a timely manner to expedite the defense's ability to do its due diligence.[3] The United States is under no obligation to sift through the provided evidence and organize it for the defense's convenience.[4]

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[1] The United States notes that these cases focus on merely providing the defense the opportunity to inspect documents within the possession of the government according to applicable rules. RCM 701 only requires inspection of such documents, yet the defense requests the Court order the United States to identify *Brady* material specifically that is contained within the produced documents the defense currently possesses.

[2] The United States does not stipulate that 7,000 pages are at issue; instead, the United States responds to the defense claim.

[3] The defense confuses the notice the prosecution provides in emails focused on discovery as identification of *Brady* material. *See* Enclosure 3, Enclosure 4, Enclosure 5. Each time the United States sends or delivers a discovery production, it sends an email similar to these enclosures and provides a brief explanation of the material.

II. GOOD FAITH TEST IN *SKILLING* IS THE CORRECT TEST, NOT *SALYER*

Assuming, *arguendo*, the Court determines that discovery in this case necessitates specific identification of *Brady* material, *Skilling* presents the correct test, not *Salyer*. *Skilling* is a published Fifth Circuit Court of Appeals decision. Additionally, the Sixth Circuit has adopted the *Skilling* test in *Warshak*. *Warshak*, 631 F.3d at 297-298 (discussing and applying *Skilling* factors). Contrastingly, *Salyer* is a district court slip opinion involving business records pertaining to racketeering. *Salyer* also suggests that its application should be limited. *See Sayler* at *8 ("The [magistrate judge] does not find, nor would he, that the identification requirements of this case would apply to other cases not similarly situated in factual circumstances."). In *Salyer*, the magistrate judge also noted that the prosecution sought voluminous material because, in essence, it could. *Salyer* at *3 n. 4 (noting that grand jury subpoenas are deliberately worded broadly). Here, the broad consequences of the alleged acts of the accused have determined the scope of discovery. *Cf. United States v. Qadri*, 2010 WL 933752 at *5 (D. Haw. Mar. 9, 2010) (considering the complex nature of the alleged crimes and necessity of coordinating branches of government in the investigation as factors for determining whether delays were undue).

Skilling describes three factors that might lead a court to conclude that the United States must identify *Brady* material: 1) padding an open file with voluminous information, 2) creating a voluminous file that is unduly onerous to access, and 3) operating in bad faith in performing its *Brady* obligations. *See Skilling*, 554 F.3d at 577. The United States has not padded discovery or acted in bad faith, nor has the defense provided any evidence of padding or specific bad faith.

Additionally, the United States has not created a voluminous file that is unduly onerous to access. The defense has received discovery in electronic format in individual "PDF" files. Similarly, the defense further protests that materials are not readily accessible, but the United States has provided multiple safes, in four different geographic locations for storing and accessing classified information where legally permitted. *See* Appellate Exhibit V, Enclosure 7; *see also* Enclosure 1. Also, the defense does not require a SCIF because neither the information being produced, none of the material subject to this motion, nor the material produced in discovery, thus far, is sensitive compartmented information (SCI). All TDS offices have been approved to hold and use classified material so long as the material is stored properly within the safe, including the office located at Fort Leavenworth, Kansas where the accused is located for pretrial confinement.

In the past year, the United States has equipped three TDS offices, and provided three safes, three classified laptops, a separate classified office at the Naval War College with a printer, courier cards, and personnel. *See* Appellate Exhibit V p. 2; Appellate Exhibit V, Enclosures 5, 8; Enclosure 2. The United States stands ready to consider future requests by the defense as they are made; however, the defense must first make those requests. Ultimately, the

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[4] The United States rejects the defense's assertions that it would not be overly arduous to identify *Brady* material for the government. Separating and identifying the *Brady* information would require preparing both sides of this case and would slow discovery, especially considering at this point in litigation the United States has produced approximately 44,835 documents totaling 447,745 pages. If the Court is inclined to order the United States to identify *Brady* material, then the prosecution would have to re-review these documents for identification purposes.

United States has operated in good faith in delivering *Brady* materials via common means, which do not create an unduly onerous burden on the defense.

III. APPLICATION OF *SALYER* FACTORS SUPPORTS NOT REQUIRING SEPARATION AND SPECIFIC IDENTIFICATION OF *BRADY* MATERIALS

Assuming, *arguendo*, that *Salyer* describes the proper standard, the facts do not support requiring the United States to separate and identify *Brady* material. First, as noted above, the United States provides *Brady* materials as soon as practicable to maximize the time during which the defense may exercise its due diligence. Second, the defense describes its team as small, but the defense recently relieved two of its members, and has not asked for additional support from the command nor TDS. Third, the accused has received considerable resources from the United States to put forth his defense. *See*, *e.g.*, Appellate Exhibit V, Enclosures 5, 6, 7, and 8. Finally, since the accused moved to Fort Leavenworth, Kansas, the United States taken steps to ensure that the accused may participate in his defense and communicate with the members of his defense team. The United States has offered to fund all military defense counsel and government team members, including experts, to fly anytime to visit their client. The accused has been granted limited access to classified material to assist in the preparation of his defense. Furthermore, classified material can be delivered to Fort Leavenworth to aid in coordination of the defense, but the defense has chosen not to move the information themselves with courier cards, nor requested the Government's assistance. Therefore, discovery is not overly onerous for the defense.

CONCLUSION

For the foregoing reasons, the United States requests the Court to Deny Defense Motion to Compel Identification of Brady Material.

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I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 24 May 2012.

ASHDEN FEIN
MAJ, JA
Trial Counsel

5 Enclosures
1. David Coombs, Re: Classified Information, 19 Apr 12 Email
2. MAJ Fein, Re: Outstanding Issues, 23 Apr 12 Email
3. MAJ Fein, US v. PFC BM (Discovery Update), 1 Sep 11 Email
4. MAJ Fein, US v. PFC BM (Art 32 Report & Discovery), 13 Jan 12 Email
5. MAJ Fein, Discovery, 4 Apr 12 Email